Department Store, Division of Dayton Hudson Corporation *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL–CIO. Case 7–CA–34182

January 23, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On December 23, 1993, Administrative Law Judge Marvin Roth issued the attached decision. The Respondent and the Charging Party filed exceptions and supporting briefs, the General Counsel and the Charging Party filed answers to the Respondent's exceptions, and the Respondent replied to the General Counsel and the Charging Party's answers and replied to the Charging Party's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

We agree, for the reasons cited by the judge, that the Respondent violated Section 8(a)(1) of the Act by engaging in surveillance of employees and by forbidding employees: to wear certain union buttons; to have guests in the employee lunchroom; and to talk to other employees. We also agree, for the reasons cited by the judge, that the Respondent discriminated against employee Nancy Kluska in violation of Section 8(a)(3) and (1) of the Act by issuing a written warning to her for allegedly violating the Respondent's solicitation and distribution policies. However, we disagree with the judge's finding that the Respondent did not violate Section 8(a)(1) by surveillance of employees and union organizers on November 24, 1992, both in the Respondent's Westland Mall store and in the nearby Coney Island restaurant.[1]

The facts as to the surveillance are as follows: On November 24, 1992, three employees and two nonemployee union organizers met in the Respondent's Westland store. Mary Schultz, a Fairlane store employee and union supporter who was on her day off, went with union organizer, Vernida Stanton, to the Westland store. The pair planned a lunch meeting with Mary Grab, the president of the Union's local. Grab was at work in the Westland store. Schultz and Stanton encountered Joel Nelson inside the store. Nelson, a union supporter, was on his day off from the Respondent's Briarwood store and also planned to meet Grab for lunch. Irene Kowal, another union organizer, by prearrangement with Stanton, met Stanton and Schultz. In a loose group, the four individuals headed for the furniture department where Grab was working and then toured that department while waiting for Grab to take her lunchbreak. Approximately five or six of the Respondent's managers followed the group.[2] At the outset, one manager greeted Schultz with a hug and friendly words as three or four other managers observed this encounter. Another manager hailed Nelson as he went down the escalator and then spoke to him at the bottom of the escalator, inquiring about why he did not visit with her. When the group toured the furniture department, another manager asked them what they were doing. On being told that they were waiting for Grab for lunch, the manager said since the group had no packages, they were not shopping. Accordingly, he said, they should leave and the manager would arrange for Grab to meet them. One manager accused Kowal of organizing and told her to stop harassing the Westland employees. The manager also engaged Kowal in a discussion about a Westland employee who had been very active on behalf of the Union but was now promoted to a management position. When Grab was ready for lunch, the group left for the nearby Coney Island restaurant.[3] The managers followed Grab and her party from the store to the restaurant where both groups ate lunch. Although the managers were too far away for them to be able to hear the employees' conversation during lunch, the managers could clearly see where Grab and her party were seated. Not all the managers remained for the approximately 45-minute lunch. Some left early. However, two or three of the Respondent's managers followed the group when it returned to the store after lunch. A manager asked Schultz if she needed help. When she declined, he indicated that this was no problem. Another manager engaged in some bantering with Kowal about ''old ladies [having] nothing better to do . . . than walk around the store.'' There was no further incident on November 24, 1992.

The judge discussed the Respondent's conduct both inside and outside the store. Concerning the former, he found that ''the Union engaged in a show of strength and effort to enlist the support of employees at work, by parading through the store during store hours.'' He discredited the alleged happenstance that brought together union organizers and employee union supporters inside the store. He noted that the Respondent's man-

[1] In the absence of exceptions, we adopt pro forma the judge's dismissal of the 8(a)(1) complaint allegations in other respects.

[2] Frank Kuse, the manager of the men's tailored department, testified that it was the Respondent's policy to give nonemployee union organizers ''the utmost customer service . . . and stick right with them and make sure that they do not harass any . . . employees.''

[3] It was common practice for both employees and managers from the Westland store to eat lunch at this restaurant.

agers addressed most of their remarks to the organizers and not the employees; that the Respondent was privileged to engage in surveillance of nonemployee union organizers inside the store; and that the Respondent's observance of employees who joined the organizers was merely incidental to this legitimate conduct. The judge therefore found no violation of Section 8(a)(1) of the Act.

The judge noted that the legitimacy of the Respondent's surveillance no longer prevailed once the group of employees and organizers left the store. However, the judge reasoned that the Respondent's managers did not intend to monitor the union activity of the employees. He noted that the Respondent's managers followed the union group into the nearby restaurant pursuant to the Respondent's policy to ''stick with'' union organizers; that the Respondent's managers and employees frequented this restaurant regularly and were often there together; and that the managers seated themselves at some distance from Grab and her party who were aware that the managers could not hear them. The judge therefore found no violation of Section 8(a)(1) of the Act.

We disagree. There was no legitimacy to the Respondent's surveillance once Mary Schultz, Vernida Stanton, Joel Nelson, Irene Kowal, and Mary Grab left the Respondent's Westland store and proceeded to the Coney Island restaurant. The group of employees and union organizers were no longer on the Respondent's premises nor were the employees on working time. Grab was on her lunchbreak and Schultz and Nelson were on their days off. Yet approximately five or six of the Respondent's managers followed the group to the restaurant, watched them throughout their meal, and then followed them back to the Respondent's Westland store. It matters not that the restaurant was commonly frequented by managers and employees simultaneously, or that the Respondent's managers could not hear the union group in the restaurant, or that fewer managers followed the group out of the restaurant than into it. What is critical is that the Respondent had a group of managers follow and watch employees who chose to associate with union organizers on their free time away from the Respondent's premises. This conduct revealed the Respondent's intention to observe at close range the Section 7 activities of Grab, Schultz, and Nelson. This intrusion on their statutory rights constitutes unlawful surveillance and violates Section 8(a)(1) of the Act.

We also find unlawful the Respondent's preceding conduct inside its Westland store.[4] Schultz was greeted by a manager as soon as she entered the store and a group of three or four other managers observed this encounter. Similarly, a manager hailed Nelson as he went down the escalator and then engaged him in conversation at the bottom of the escalator. A group of managers immediately formed and pursued the union group as they toured the furniture department and waited for Grab to commence her lunchbreak. The managers told the union group to leave because they had no packages and were not shopping. When the union group did leave for lunch, the group of managers followed them through the store and to the nearby Coney Island restaurant.

The Respondent's action made it graphically plain to employees that the Respondent was as concerned with monitoring the activity of the employees as the nonemployees in the union group. Concededly, the managers addressed most of their remarks to the nonemployee union organizers in the group. They did not, however, ignore the employees. Off duty employees Schultz and Nelson were promptly told, once on the Respondent's premises, that the Respondent was watching them. The Respondent also told them, as well as the nonemployee union agents, that they should leave the Respondent's premises. The Respondent did not restrict its surveillance to its own premises. The surveillance which had begun in the Respondent's Westland store continued into the nearby Coney Island restaurant and then continued further as the managers followed the employees back to the store. There was nothing incidental about the Respondent's obtrusive surveillance of its employees inside its Westland store by a group of five or six managers. The Respondent watched and followed Schultz, Nelson, and Grab in one discrete and continuous episode which incorporated the store, the restaurant, and the return to the store. Accordingly, we find that the Respondent violated Section 8(a)(1) of the Act by monitoring the union activity of its employees on November 24, 1992, both inside its Westland store and inside the nearby Coney Island restaurant.[5]

[4] Member Cohen agrees with the judge that the Respondent's conduct inside the store did not constitute unlawful surveillance.

[5] Contrary to the judge, we find that *CVN Companies*, 301 NLRB 789 fn. 1 (1991), supports finding a violation here. In that case, a manager sat next to an employee who was seated with other employees discussing the Union during their lunchbreak. The manager said: ''This ought to be interesting because the Union lady is going to talk.'' The Board found that the manager, by his words and actions, was actually monitoring the union activities of the employee. Similarly, in this case, the Respondent's managers engaged in a course of conduct that demonstrated their intent to monitor the union activities of employees Mary Schultz, Joel Nelson, and Mary Grab. The management group did not simply follow the employees while they were in the company of union organizers, Vernida Stanton and Irene Kowal, on the Respondent's premises. The managers' conduct commenced when they let the employees know that they were aware of their presence and that their associating with the organizers was unwelcome. Next, the group of five or six managers closely followed the employee group as it moved through the store prior to the rendezvous with Grab and afterwards as it moved from the store to the nearby Coney Island restaurant. At the restaurant, the managers seated themselves where they could observe the employees. Then the monitoring persisted as some of the managers followed the employee

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Department Store, Division of Dayton Hudson Corporation, Detroit, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(e).

''(e) Engaging in surveillance of employees because of their union activities both inside the Respondent's Westland Mall store and inside the nearby Coney Island restaurant.''

2. Substitute the attached notice for that of the administrative law judge.

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group back to the store after lunch. This was no mere incidental observance of Schultz, Nelson, and Grab coincidental with lawful observation of Stanton and Kowal on the Respondent's premises. Rather, the group of managers, by their actions and words from the beginning inside the Respondent's store to the end back at the Respondent's premises, made it plain that they intended to monitor the union activity of the Respondent's employees. This conduct violates Sec. 8(a)(1) of the Act.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discourage membership in International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL–CIO, or any other labor organization, by issuing warnings to employees or otherwise discriminating against them because of their union activities.

WE WILL NOT discriminatorily prohibit employees from distributing union literature, or prohibit them from distributing union literature during nonwork time and in nonwork areas.

WE WILL NOT discriminatorily prohibit employees from wearing union buttons or other insignia.

WE WILL NOT discriminatorily impose restrictions on the movement and talking of employees because of their union activities.

WE WILL NOT engage in surveillance of employees because of their union activities, both inside our Westland Mall store and inside the nearby Coney Island restaurant.

WE WILL NOT discriminatorily exclude guests of employees from our employee lunchrooms because of the union activities of the employees or their guests.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your right to engage in union or concerted activities, or to refrain therefrom.

WE WILL rescind the written warning issued to Nancy Kluska in October 1992, remove from our records any reference to the warning, and notify her in writing that this has been done.

DEPARTMENT STORE, DIVISION OF DAYTON HUDSON CORPORATION

Richard F. Czubaj, Esq., for the General Counsel.
Timothy K. Carroll, Esq., of Detroit, Michigan, for the Respondent.
Nancy Schiffer, Esq., of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. This case was heard at Detroit, Michigan, on September 27 and 28, 1993. The charge was filed on January 21, 1993, by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL–CIO (the Union). The complaint, which issued on March 30, 1993, alleges that Department Store, Division of Dayton Hudson Corporation (Respondent or the Company)[1] violated Section 8(a)(1) of the National Labor Relations Act (the Act). The gravamen of the complaint is that the Company allegedly engaged in various acts of unlawful interference, restraint, and coercion, including threats of reprisal, surveillance of union supporters, and overly broad or discriminatory enforcement of no-solicitation and no-access rules.

The Company's answer denies the commission of the alleged unfair labor practices. All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. The General Counsel, the Union, and the Company each filed a brief.

All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. On the entire record in this case,[2] and from my observation of the demeanor of the witnesses, and having considered the briefs submitted by the parties, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The Company, a corporation, with its headquarters in Southfield, Michigan, is engaged in the operation of retail department stores. The Company's Westland Mall store in Westland, Michigan, and Eastland Mall store in Harper Woods, Michigan, are the only facilities involved in this proceeding. In the operation of its business, the Company annually derives gross revenues in excess of $500,000, and annu-

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[1] The name has been amended to reflect Respondent's correct name.

[2] Certain errors in the official transcript of proceedings are noted and corrected.

ally purchases and receives at its Michigan stores goods valued in excess of $50,000 directly from points outside of Michigan. I find, as the Company admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

In late 1989 the Union commenced an organizational campaign among the employees of the Company's stores in the Detroit metropolitan area. On May 11, 1990, pursuant to the Union's petition (Case 7–RC–19227), the Board conducted a representation election at the Westland store. Among approximately 537 eligible voters, 274 voted for the Union and 179 against. The Company filed timely objections to the conduct of the election. Following a hearing, the hearing officer recommended that the objections be overruled. The Company filed exceptions to the hearing officer's report and recommendation. On December 26, 1990, the Board issued its decision, adopting the hearing officer's findings and certifying the Union as bargaining representative.

The Union requested bargaining, but the Company refused. The Union filed an unfair labor practice charge, the General Counsel issued a complaint, and on May 15, 1991, the Board issued a Decision and Order directing the Company to bargain (302 NLRB 982). Subsequently the Company filed a motion to reopen the record based on newly discovered evidence. The Board denied the motion. The Company petitioned for review to the Sixth Circuit Court of Appeals, and the Board filed a cross-petition for enforcement.

On March 1, 1993, the court of appeals remanded the case to the Board to reconsider part of the Company's arguments in light of a previous holding by the court, and for further hearing with respect to another allegation. The Board accepted the remand, but to my knowledge has not yet otherwise acted in the matter.

Meanwhile, following the Board certification, the Union established its Local 3500 for the Westland unit, and in early 1991 conducted elections for union offices. Employee Mary Grab is the Local's president. For its part the Company seeks and anticipates a new election. Store Manager Mike Gilligan has periodically mailed antiunion literature to the store employees.

The Board also conducted representation elections at the Company's Pontiac and Fairlane Mall stores. The Pontiac election conducted on October 12, 1990, resulted in 157 votes for the Union and 187 against. The Union filed timely objections to the election. Following a hearing, the Board's hearing officer issued a report and recommendations, finding merit in two objections, specifically, that the Company granted raises to 10 employees in order to influence the election, and threatened loss of retirement benefits if the Union won the election. The Regional Director scheduled a second election, but the Union subsequently withdrew its election petition. Unfair labor practice charges filed by the Union resulted in a settlement agreement.

At Fairlane Mall, the Union won an election conducted on April 12, 1991. However the election was set aside on the basis of an objection filed by the Company. The Regional Director scheduled a second election. The Union lost the second election. The Union filed objections and unfair labor practice charges. The parties agreed to a third election, but the Union subsequently withdrew its election petition, opting to proceed instead on its unfair labor practice charges. The General Counsel issued a consolidated complaint, and the allegations were heard by Administrative Law Judge Irwin Socoloff in a 7-day hearing in April and June 1993. Briefs were submitted in September 1993, and the matter is pending decision by Judge Socoloff.

The present allegations before me must be decided on the basis of the evidence adduced in the present hearing. The findings of a hearing officer in a (nonadversarial) proceeding on objections to an election do not constitute Board precedent. That is particularly true where, as in the Pontiac representation proceeding, the Union withdrew its election petition, thereby precluding Board review of the matter. Therefore, the hearing officer's findings cannot be considered as evidence in this proceeding. It would also be inappropriate for me to consider any or all the evidence adduced in the Fairlane Mall matter. Indeed, it would not be possible for me to make findings on those allegations, as unlike Judge Socoloff, I did not hear the witnesses. If the Union wanted the present case to be considered together with the Fairlane Mall allegations, then the Union could have filed a timely motion with the Board's Regional Director to consolidate the cases for hearing. (As indicated, the present complaint issued prior to commencement of the hearing before Judge Socoloff.) However, the Union chose not to do so.

B. *The Present Allegations*

1. Alleged order to remove union buttons

The complaint alleges that about January 16, 1993, the Company, by its agent, Bob Ivan, ordered employees to remove buttons denoting support for the Union.[3] This is the only allegation involving the Eastland Mall store.

Mary Kay Freeman is clerical assistant in the design studio at the Eastland Mall store. On January 16 she was at work at the front reception desk. Freeman was wearing a button which proclaimed: ''Just say yes to peace.'' The Union provided these buttons to its supporters in response to ''just say no'' buttons worn by company managers as an expression of opposition to unionization. Freeman testified in sum as follows: Store Manager Vince Giacobbe told her it was a union button, and made a clucking sound. Freeman acknowledged that it was a union button. About 4 days later Freeman's supervisor, Design Studio Manager Bob Ivan, came by and, seeing the button, told her to take it off. Freeman refused. Some 20 minutes later Ivan came by again and said: ''I told you to take this button off.'' Freeman again refused. About this time an employee walked by wearing a ''just say no'' button. Freeman remarked that when ''Carl from display'' took his button off, ''then we'll talk about taking my button off.'' Ivan replied: ''Point taken.''

[3] All dates herein pertain to the period from July 1, 1992, through June 30, 1993, unless otherwise indicated.

Freeman was the only witness to testify concerning the above incidents. As a general rule, employees have a statutorily protected right to wear union insignia at work. An employer rule prohibiting employees from wearing union emblems while at work violates Section 8(a)(1), absent evidence that special circumstances make the rule necessary to maintain production and discipline. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945): The employer has the burden of presenting evidence which demonstrates such circumstances. *Mack's Supermarkets*, 288 NLRB 1082, 1098 (1988). Moreover, an employer violates the Act by enforcing even a facially valid rule in a discriminatory manner. *Uniontown Hospital Assn*., 277 NLRB 1298 (1985).

In the present case, the Company failed to allege even the existence of a rule prohibiting the wearing of buttons or other insignia at work, let alone circumstances which would justify such a rule if it existed. Former employee Irene Kowal testified without contradiction that managers wore ''just say no'' buttons at work.

I credit the uncontradicted testimony of Freeman concerning her encounters with Managers Giacobbe and Ivan. I do not agree with the Company's argument (Br. 18) that Freeman was engaged in a voluntary discussion or debate with her supervisors concerning the merits of unionization. Manager Ivan twice ordered Freeman to remove her button. Freeman risked disciplinary action by invoking her statutory right and refusing his order. Freeman escaped such action only because she was fortuitously able to demonstrate the blatantly discriminatory nature of Ivan's action, i.e., that the Company permitted its personnel to wear antiunion buttons at work. Other union adherents might not have been so bold, or lucky. The Company interfered with Freeman's statutory right, and did so in a discriminatory manner. The Company thereby violated Section 8(a)(1) of the Act. See *NLRB v. Schwan's Sales Enterprises*, 687 F.2d 163 (6th Cir. 1982). I further find that the incident may be considered as evidence of company discriminatory motivation in connection with other alleged unfair labor practices in this case.

2. Written warning to Nancy Kluska

The complaint alleges that about October 28, 1992, the Company by its agent, Linda Greene, engaged in overly broad enforcement of its no-distribution rule by issuing a written warning to employee Nancy Kluska because of her distribution activities on behalf of the Union.

The Company has a written no-distribution policy which states that: ''No distribution of literature, pamphlets, documents or other materials, except for the annual United Way Drive, is permitted during working time and no distribution of any sort is permitted in any working area, at any time.'' Copies of the rule (and the Company's no-solicitation policy) are posted throughout the Westland Mall store: two in the locker room, two in the employee lounge, one in the store's public restaurant, one in the human resource office, and one on the lower level.

Nancy Kluska has been a company employee at the Westland Mall store for 15 years. Kluska testified in sum as follows: At about 9 a.m. on October 28 she was distributing union fliers in the employee locker room. She overheard security personnel talking about shortages in registers. Kluska was curious, and stepped into the adjacent aisleway to join their conversation. The aisleway is located at the north end of the store. The store does not open to the public until 10 a.m., and consequently only company personnel would be coming through the aisleway at that time. Company personnel from other stores were coming in, apparently for a meeting (unlike store employees, they signed in as they entered). The aisleway is adjacent to the security office and package pickup area. The only employees at work in those areas were employees engaged in ''loss prevention.''

Kluska further testified in sum as follows: Company President Dennis Toffolo entered the store through the aisleway. Kluska handed him a union flier, which he dropped to the floor. At the time Kluska was about three steps into the aisleway from the locker room. Some 3 to 4 minutes later, Company Personnel Manager Linda Greene approached Kluska. Green told Kluska: ''You have to pass those out in the locker room. You can't pass them out in the hallway.'' Kluska returned to the locker room. In the interim between the arrivals of Toffolo and Greene, Kluska did not distribute any fliers. No store employees entered during that time, and Kluska did not distribute the fliers to nonstore personnel other than Toffolo. It is undisputed that about noon on October 28 Green summoned Kluska to the personnel office, where she issued Kluska a written warning for violating the Company's ''solicitation policy'' by ''standing in our Package Pickup area distributing a union handout.'' Kluska did not testify as to what if anything she said to Greene.

Employee and Local Union President Mary Grab testified in sum as follows: The Union understood that literature could be distributed in the locker room, but not in the aisleway described by Kluska, as that was considered a work area. About 2 weeks after the Kluska incident, Grab was leaving work at about 5:15 p.m. She saw employee Mary Alice Simpson distributing antiunion literature by the wall opposite the package pickup window. Simpson was about four steps from the locker room door. The store was open and the area was open to the public. Security personnel and managers (who Grab could not identify) were present. Grab told Simpson that she could not stand there and leaflet. Simpson answered that she was not on the clock. Grab referred to the Kluska writeup, and told Simpson she should go outside or into the locker room. Simpson initially ignored Grab's admonition, but moved to the locker room when Grab began writing on a notepad.

Personnel Manager Greene testified in sum as follows: At about 9:30 a.m. on October 28, pursuant to her usual practice, she headed for the employee entrance to greet employees as they arrived. The security office, and later Toffolo, told her that Kluska was in the aisleway. Greene observed Kluska with fliers in her hand. Greene told her: ''Nancy, you know the rules. You need to be inside the locker room.'' Kluska answered that she knew, and went into the locker room. Later Greene summoned Kluska to the personnel office to discuss the Company's solicitation policy. Kluska said she knew the policy. Greene gave Kluska the written warning because Kluska knew the policy, and because the aisleway, although not a work area, was part of the selling floor. (The Company's ''solicitation policy'' expressly prohibits solicitation ''on a selling floor at any time during store hours.'') There could have been customers in the area, because beauty parlor customers come through that area at 9 a.m. for their appointments. However, Greene was not aware of any customers in the area at that time.

Greene further testified in sum as follows: Some time after the Kluska incident, employee Simpson came to see Greene. Simpson was upset because Grab told her to go to the locker room. Simpson, a known ''vote no person'' was distributing procompany fliers in the package pickup area at about 5 p.m. Greene told Simpson that Grab was correct. Greene instructed Simpson to be careful and to tell the rest of the ''vote no'' committee to remain in the locker room or employee lounge, or Greene would issue them a written warning. Greene testified at one point that she did not give Simpson a written warning because she did not know the policy, and at another point that Simpson did not understand about ''non-working area.'' However, Greene conceded in her testimony that the ''vote no'' employees: ''knew the policy. That they had a clear understanding of where the employee areas were. It's the locker room and the lounge or outside the building.'' Greene also conceded that Simpson worked at the Westland Mall store for over 25 years, and probably saw the posted notice.

As a general rule, an employer may, in a nondiscriminatory manner, promulgate or enforce a rule prohibiting distribution of literature in working areas. An employer engaged in operation of a retail store, may, in a nondiscriminatory manner, also promulgate or enforce a rule prohibiting solicitation on its selling floors. *Stoddard-Quirk Mfg. Co*., 138 NLRB 615 fn. 4 (1962). However, an employer violates the Act by maintaining, enforcing, or applying such rules in a discriminatory manner, e.g., in such a manner as to favor antiunion employees over union adherents. *Blue Bird Body Co*., 251 NLRB 1481, 1485 (1980), enfd. mem. 677 F.2d 112 (5th Cir. 1982); *Federated Dept. Stores*, 241 NLRB 240, 246 (1979).

I find for two reasons that the Company violated Section 8(a)(1) and (3) by issuing a written warning to Kluska. First, the Company's posted solicitation and distribution policy, on its face, did not prohibit distribution of literature in the aisleway area prior to 10 a.m. As indicated, the ''distribution policy'' prohibited ''distribution of any sort . . . in any working area.'' However, Personnel Manager Greene testified that the aisleway was not a working area. Therefore, by Greene's own definition, the policy did not prohibit distribution in that area. Indeed, when Greene issued a written warning to Kluska, she invoked the ''solicitation'' rather than the ''distribution'' policy. The ''solicitation'' policy prohibited solicitation ''on a selling floor at any time during store hours.'' Greene testified that the aisleway was part of the selling floor in that it was adjacent to the young men's department. However, the store generally, including the young men's department, was not open to the public until 10 a.m. Therefore, the posted policies purported to permit employees to engage in distribution in the aisleway prior to 10 a.m. Nevertheless, the Company disciplined Kluska for engaging in what, in the absence of valid restriction, constituted a protected statutory right.

Second, the Company enforced its rule, as interpreted by Greene, in a discriminatory manner, by issuing a written warning to Kluska for engaging in union distribution, but refusing to discipline Simpson for engaging in antiunion distribution in the same area. Greene's assertion that Simpson was not familiar with the Company's policy, or interpretation of that policy, is incredible. As indicated, Greene testified, that the ''vote no'' committee, which included Simpson, knew perfectly well that distribution was permitted only in the locker room, employee lounge or outside the building. Nevertheless, Greene gave Kluska a written warning for giving Company President Toffolo a handbill before store hours, but did not discipline Simpson, who distributed antiunion literature in the aisleway when the store was open. I have also taken into consideration the Company's conduct toward Mary Freeman, indicating a predisposition to discriminate in favor of union opponents and against union adherents. In sum, the Company ''disparately and discriminatorily applied (its rule) against union-advocating employees in violation of the Act.'' *Federated Dept. Stores*, 241 NLRB at 246.

3. Alleged disparate enforcement of no-solicitation rule

The complaint alleges that in late September, the Company, by manager of Petites and Updates, Jackie Borman, disparately enforced the Company's no-solicitation rule by ordering employee union supporters on break not to talk to other employees on break, and to leave a public area of the store.

Jacqueline Garner was employed at the Westland Mall store for 16 years, until October 3, 1992, when she opted to take severance rather than transfer to sales, when her job as design assistant clerical was eliminated. Garner was a known union supporter and member of the Union's bargaining committee. She participated in demonstrations, distributed union literature, and her name appeared on such literature. Garner testified in sum as follows: One day in late September, she met employee Joyce Speen in the lunchroom, located on the second floor of the store. Speen worked in the dress department, also located on the second floor. Both employees were on their break. They left together to return to work, walking to the elevator, as Garner was taking inventory in the furniture department on the lower level. They were standing and conversing in an aisleway by the elevator, when Manager Borman came ''charging'' up to them. Borman was neither employee's supervisor. Borman told Garner: ''I want you off this floor and I want you to leave these employees alone.'' Speen protested that they were not talking about the Union, but ''this is a personal matter.'' Borman replied: ''I don't care what you are talking about; I want you [Garner] off this floor.'' At the time, Garner and Speen were both still on their break.

Manager Borman was not presented as a witness in this proceeding. Freeman was the only witness to testify concerning the incident. Garner and present or former employees Joel Nelson, Nancy Kluska, and Irene Kowal testified in sum, without contradiction, however, that the Company had no policy prohibiting employees from talking to each other when on break, or at work when they were not busy, or restricting them to their assigned areas when they were on break.

In light of this unexplained deviation from company policy, company knowledge of Garner as a leading union adherent, and evidence herein discussed, demonstrating a company tendency to discriminate against union adherents, I find that the General Counsel presented a prima facie case that Manager Borman ordered Garner off the second floor, and to refrain from talking to employees on that floor, because of her union activity. I would not characterize Borman's action as enforcement of a no-solicitation rule. Garner was not engaged in union solicitation, Speen so informed Borman, and

Borman asserted that she did not care what they were talking about. However, it is an unfair labor practice for an employer to discriminatorily impose restrictions at work on the movements and talking of known union adherents, regardless of whether such movements or talking involves union activity. *Southwire Co.*, 277 NLRB 377, 389–390 (1985), enfd. 820 F.2d 453, 464 (D.C. Cir. 1987); *Jennie-O Foods*, 301 NLRB 305, 316 (1991). By imposing such restrictions on Garner, the Company violated Section 8(a)(1) of the Act.

4. Alleged disparate enforcement of no-access rule

The complaint alleges that about October 20, the Company, by its agent Bill Valentino, disparately enforced the Company's no-access rule by ordering a former employee who was a guest of current employee union supporters to leave the employee lunchroom.

The Company maintains an employee ''lunchroom'' on the second floor of the Westland Mall store. The lunchroom does not provide cafeteria service, but contains vending machines, and employees may bring food into the lunchroom. Other Company stores have similar lunchrooms. An ''Employees Only'' sign is posted at the entrance to the Westland Mall lunchroom. The lunchroom, like those at other company stores, is not open to the general public. However, present and former employees Garner, Kluska, Grab, and Kowal, and also Nelson with respect to the Company's Northwood and Briarwood stores, testified in sum that the Company has always permitted friends and relatives of employees in the lunchroom. In particular, Mary Grab testified that after the incident which is the subject of this allegation, she saw former (retired) employee Jane Powell in the Westland Mall employee lunchroom. Although Store Manager Gilligan, Company Official Mike Hyter, and security personnel were present, Powell was permitted to remain in the lunchroom. The employee witnesses testified in sum that (except with respect to the incident which is the subject of this allegation), they never saw anyone escorted from the lunchroom because they did not belong there. William Valentino, who was manager for men's tailored, shoes, and luggage at the Westland Mall store from June 1992 to March 1993, and the Company's only witness concerning this matter, testified that he never (other than the incident in question) saw nonemployees in the employee lunchroom. However he also testified that he seldom ate in the lunchroom, and he did not deny the testimony of the General Counsel's witnesses to the effect that friends and relatives of employees used the lunchroom.

Jacqueline Garner, who left her employment on October 3, went to the Westland Mall store on October 20 to pick up her last paycheck and make a credit union deposit. She saw Joyce Speen, who invited her to join Speen in the employee lunchroom. They sat down at a table with other employees, including Mary Grab. Garner and Grab testified in sum as follows: Manager Valentino and two company security guards came into the lunchroom. Valentino told Garner that she had to leave, Garner asked why. Valentino answered: ''You no longer work here.'' Garner asked: ''Aren't friends and relatives allowed in the lunchroom?'' Valentino answered: ''No.'' Garner asked: ''Since when?'' Valentino replied: ''Since you walked in 10 minutes ago.'' Garner got up and left.

Manager Valentino testified in sum as follows: He knew Garner, and knew her to be a union supporter. He saw Garner enter the employee lounge (lunchroom) with Grab and other employees. Valentino called the Company's executive office and asked the secretary who answered the phone whether a nonemployee could use the employee lounge. The secretary answered: ''No.'' Valentino explained that Garner was in the lounge having lunch with Mary Grab. The secretary told Valentino to tell Garner that she could not stay there. Valentino went into the lounge. A security officer joined him. Valentino told Garner that the lounge was for employees only, and she had to leave. Garner asked: ''Oh, I do?'', Valentino answered: ''Yeah, that's our policy to my knowledge.'' Grab remarked that she did not know that Garner could not stay. Valentino did not answer her, and Garner left. Valentino did not make any remark to the effect that this was the policy since Garner walked in.

I credit the substantially uncontroverted testimony of the General Counsel's witnesses to the effect that the Company normally permitted friends and relatives, including former employees, to join employees in the employee lounge-lunchroom. Therefore, it is unnecessary to decide whether Valentino impliedly admitted to such a policy. I find that the Company evicted Jacqueline Garner from the employee lunchroom because she was a known union activist. I agree with the Company's assertion (Br. 17) that as of October 20, Garner was no longer an ''employee,'' and consequently not directly entitled to the protection of the Act with respect to this matter. However, the Company's practice of permitting guests of employees to use the lunchroom-lounge was a privilege which inured to the benefit of the store employees, i.e., a benefit of their employment. Here, the Company discriminated against store employees by excluding their guest from the lunchroom because that guest happened to be a union activist. The Company thereby discriminatorily denied its employees a benefit of their employment in order to discourage union activity, and violated Section 8(a)(1) of the Act.

5. Alleged surveillance and related allegations involving only store employees

The complaint alleges that about November 15, the Company by then Market Place Department Manager Belinda Rholader, engaged in coercive surveillance of employee union supporters by following them and monitoring their conversations.

Employee Mary Ann Flowers worked as a sales consultant in the Market Place (kitchenware department) at the Westland Mall store. Flowers, a known union supporter who always wore a prounion button at work, was chairman of the Union's local bargaining committee. Flowers testified in sum as follows: One day in November the Union was holding a ''demonstration'' outside the store. Flowers was at work, but employee Carmen Schrader, who was off that day, participated in the demonstration. Flowers went to a restroom located on the third floor (where both Flowers and Schrader worked). There she met Schrader, who came into the restroom to warm her hands. They conversed. Meanwhile Rholader, Flowers' supervisor, followed Flowers to the restroom and stood in the middle of the floor while Flowers and Schrader talked for about 2 or 3 minutes. The employees did not discuss the Union, and Rholader said nothing.

Flowers was the only witness to testify concerning the alleged incident. Personnel Manager Greene testified that

Rholader left the Company's employ about 6 months before the present hearing, and Greene did not know her whereabouts.

The complaint further alleges that about November 28, the Company, by Women's Shoe Department Manager Jay Clothier, engaged in coercive surveillance of employee union supporters by interrupting their conversations, asking what they were talking about and monitoring their conversations.

Nancy Kluska is union recording secretary, wears a union button at work, and, as indicated, distributes union literature. Kluska testified in sum as follows: About November 29 she was on her way to work in the men's fragrances department, located on the first floor. She stopped in the shoe department (also on the first floor), to give her friend Joyce Zelleck a check. Zelleck was at work, and customers were in the area, but Zelleck was not busy. They talked briefly. Department Manager Clothier came up to them and said to Kluska: ''I'm going to have to put a badge on you and let you work in my department.'' Kluska responded: ''That's all right. At least I'd show up every day.'' Clothier remained with the employees until Kluska left to report to her department. Clothier walked with her almost until she reached the men's fragrances department.

Kluska was the only witness to testify concerning the alleged incident. Manager Clothier was not presented as a witness in this proceeding. However, Manager Valentino testified that he was under instructions, both with respect to employee union adherents and ''vote no'' committee members, that if they were on break he should do ''absolutely nothing as long as they're not bothering anybody who is on company time,'' but ''if they are out of their area on company time, you ask them to go back to their area.'' Manager Frank Kruse testified to the same effect.

As a general rule, an employer may lawfully engage in surveillance of its employees at their work stations. Working time is for work, and the employer has the right to observe their work or to determine whether they are performing that work. However, the employer cannot engage in such surveillance for unlawful reasons, e.g., in reprisal for the employee's union activities, or for the purpose of obtaining pretextural grounds for disciplining the employee in reprisal for such union activities. See *Brown & Root-Northrop*, 174 NLRB 1048, 1058 (1969).

In the present case, as indicated, the General Counsel's witnesses credibly testified that the Company had no policy prohibiting employees from talking to each other when on break, or at work when they were not busy, or restricting them to their assigned areas when they were on break. With regard to the Flowers incident, employee Schrader was not at work, and Flowers was taking her break, when Manager Rholader followed Flowers into the restroom. The Company offered no explanation as to why Rholader would follow Flowers into the restroom, and then stand conspicuously in the middle of the restroom throughout the conversation between the two employees. As to the Kluska incident, Zelleck was at work, although Kluska had not yet reported to work. However, Zelleck was not busy. Therefore, under usual company practice, Clothier would not have objected to their conversation. It is also significant that Clothier said nothing to Zelleck. Instead, he addressed his remark to Kluska, and proceeded to follow her to her department. As indicated by the Garner-Borman incident. The Company sought to restrict and impede contact between leading union adherents and other employees. Flowers and Kluska, like Garner, were leading union activists. I find that the Company engaged in surveillance of Flowers' and Kluska's movements and conversations because of their role as leading union activists, and to intimidate them from contacts with other employees. The Company thereby violated Section 8(a)(1) of the Act.

6. Alleged surveillance involving employees and nonemployee union representatives

The complaint alleges that about October 5, the Company, by Department Managers Frank Kruse, Tony Seymour, Peggy Horn, and Jackie Borman, followed and engaged in coercive surveillance of employee union supporters who were on their breaktime in the Westland Mall.

The operative facts concerning this occurrence are undisputed. Jacqueline Garner and Mary Grab testified in sum as follows: On Monday, October 5, Garner (by then a former employee), employees Grab and Flowers, and union official, Bob King, and retiring union official, Ray Westphal (both nonemployees) walked together through the Westland Mall store during store hours. Grab and Flowers were on their breaktime. Westphal had been honored with a plaque on his retirement. The purpose of this procession was to show the plaque to employees who had not previously seen it. The procession lasted for 30 to 40 minutes. The group approached employees who were at work, but not busy. They did not approach any employee with a customer. This procession was closely followed by another procession consisting of six or seven managerial personnel, including Kruse, Seymour, Horn, and Borman. During their walk, the managers made nonthreatening remarks to the nonemployees, but did not attempt to prohibit the union group from engaging in their activity. The union people sometimes responded with their own remarks. Seymour told Westphal: ''You're a nothing little man and people just tolerate you.'' Kruse asked Garner if she was working for the Union. Garner asked Seymour why the managers were following them. Seymour answered: ''We are not going to let happen this time what happened the first time. We were not prepared for the first election. This time we will be prepared.''

The Company's witnesses did not testify concerning this incident. However, Managers Kruse and Valentino testified in sum that they were under instructions, with respect to nonemployee union people, to give them excellent customer service, but walk with them to make sure they did not harass employees.

The Company by its action did not violate the Act. First, three of the five union people who walked through the store were nonemployees, including two union officials. The Company was privileged to engage in surveillance of these persons while they were on store premises. The Company cannot be faulted if two employees chose to join this group, as observance of the employees was ''merely incidental'' to ''lawful surveillance'' of the union officials. *Crowley, Milner & Co.*, 216 NLRB 443 (1975). Second, the procession of union people through the store during business hours constituted in reality a ''demonstration,'' no less than a picket line or handbill distribution. This was not an instance of a conversation between a union organizer and employee adherent. Rather, a group of five union officials and adherents paraded through the store, displaying a plaque, and seeking to

enlist the support or sympathy of employees who were on their worktime and at their work stations. The Company had a right to observe such open union activity, and as it did in substance, stage its own counterdemonstration. Remarks were directed only at the nonemployees. The managers did not threaten, question, or even initiate conversations with the two employees. ''Union representatives and employees who choose to engage in their union activities at the employer's premises should have no cause to complain that management observes them.'' *Adams Super Markets*, 274 NLRB 1334 (1985). Therefore, I am recommending that this allegation be dismissed.

The complaint further alleges that about November 20, the Company, by Managers Bill Valentino and Janice Heffernan, engaged in coercive surveillance of employee union supporters by following them in the Westland Mall and monitoring their activities while they were in the Mall Coney Island restaurant.

The General Counsel presented four witnesses concerning this alleged incident: Mary Schultz was employed at the Company's Fairlane store; Joel Nelson worked at the Briarwood store; Mary Grab, as indicated, worked at Westland Mall. Irene Kowal previously worked at the Westland Mall store for 25 years, retired, and since 1991 has worked for the Union as an organizer. Vernida Stanton, who was not called as a witness, is also a former company employee who as of November 1992 was working as an organizer for the Union.

Mary Schultz testified in sum as follows: November 24 was her day off. She went with Stanton to visit Mary Grab and other friends at the Westland Mall store. Schultz was wearing a union button. They went first to the cosmetics department to see employee Barb Adams, who was at work. Adams and the department manager, who both previously worked at Fairlane, greeted Schultz. Three or four managers stood nearby, watching as the four exchanged greetings and briefly conversed. Schultz and Stanton then went to see Grab. Joel Nelson came by, as did a manager. All four walked in the same direction. The manager called Nelson by name, but he did not answer. Schultz, Stanton, and Nelson went down the escalator, and Schultz and Stanton met Irene Kowal. Schultz, Stanton, and Kowal went through the furniture department, and Nelson went elsewhere. Three or four managers, including Greene, Kruse, and Heffernan, followed them. When Schultz, Stanton, and Kowal reached the carpeting department, Mary Grab was on the telephone. Manager Greene asked Schultz what they were doing there. Schultz answered that they were waiting to go to lunch with Grab. Greene replied that since they were not shopping, she would have Grab meet them, and suggested that they leave. Schultz and her companions chose to remain. There was a conversation between the managers, Kowal and Stanton. When Grab appeared ready to leave for lunch, Schultz, Kowal, and Stanton left the store.

Joel Nelson testified in sum as follows: On November 24 he went to the Westland Mall store to meet Mary Grab for lunch. Nelson had participated in leafleting and other union activities, and was wearing a union ''peace'' button that day. At the main store entrance he met Kowal, Schultz, and Stanton, and invited them to join him and Grab for lunch. They entered the store. About halfway down the main aisle, Manager Valentino, walking in front of Nelson, spoke into a portable telephone: ''Get hold of Janice Heffernan. Joel Nelson is in the store.'' Nelson remarked: ''Say hi to Janice for me.'' Nelson went down the escalator, and his companions followed. Meanwhile, Manager Heffernan, who was Nelson's former manager at the Briarwood store, repeatedly yelled his name. On the floor below, Heffernan asked why he didn't stop, what he was doing in the store, and suggested he visit her. Nelson replied that he was on the escalator, and that he was in the store to meet Grab for lunch. When Nelson reached the carpeting department, Grab was busy with a customer. Nelson walked around the furniture department. Meanwhile, four managers, including Valentino, followed Nelson's companions, who were following Nelson. There was ''verbiage going on'' and ''it was a chaotic scene.'' When Grab finished her transaction, the others left the store to go to lunch.

Mary Grab testified in sum as follows: She arranged to meet Nelson for lunch. When he arrived at the carpeting department, she was on the telephone, handling a customer is problem. When she got off the phone she went to the office to fax pertinent information to the customer. She returned to the department. Manager Kruse asked her some questions, which she answered. Grab told Kruse that she was going to lunch, and then went to join the others.

Irene Kowal testified in sum as follows: On the day in question she went to the Westland Mall store to attend an informal luncheon of retired employees in the store's public cafeteria. She met Stanton and Schultz, and agreed to join them for coffee after the retirees luncheon. They waited in the store, but Kowal got separated from the others, and walked toward the carpeting department, where she saw Nelson, Stanton, Schultz, and two retirees who were to attend the retirees luncheon, Shirley Giles and Jackie Del Greco (Del Greco was a retired employee, and Giles was a ''retirement plus'' employee who could work part time). Kowal, Giles and Del Greco took Schultz on a tour of the furniture department. A group of five or six managers stood nearby. Manager Greene asked Kowal if she was going to buy anything. Kowal answered that she was just looking. Greene told her she had to leave. Kowal refused, and the four continued looking. Corporate Human Resource Official Hank Bechard told Kowal: ''You better leave right now. I know what you're doing,'' explaining ''you're organizing.'' Kowal responded that the store was organized, and refused Bechard's order to leave. Eventually everyone moved to the main aisle of the lower level—the union group and the management group. By this time there were six managers in the latter group. Manager Valentino accused Kowal of harassing employees, and Kowal denied the accusation. The managers continued to make remarks to Kowal, e.g., that there would be no bargaining order, and how the Company dealt a blow to the Union by promoting a leading union adherent to a management position. The union group then proceeded out the store.

The foregoing is the substance of what might be described as phase 1 of the sequence of events which occurred on November 24. With regard to phase 2, the General Counsel's witnesses testified in sum as follows: The union group proceeded out the store, followed by the management group. The union group headed for lunch at the Coney Island restaurant, which is located within Westland Mall. The management group continued to follow them. It was now about 2:30

p.m. The union group sat down at a booth in the Coney Island. The managers took a booth across the aisle and a few booths down from them. Both groups remained for about 40 minutes, but Heffernan and at least one other manager left earlier. The managers were eating and drinking. They were not close enough to the union group to hear their conversation. When the union group left, the remaining managers, including Valentino, followed them. (Nelson testified that Valentino was talking on his portable phone.) When the union group reached the store, they dispersed.

Mary Schultz further testified in sum as follows: She went back into the store, accompanied by Stanton, in order to visit a friend in the women's clothing department on the first floor. A manager wearing a ''No'' button asked them if they needed help. They said they were just looking. The manager said, ''Fine,'' and they left shortly thereafter. Irene Kowal further testified in sum as follows: She went back into the store with Giles and Del Greco, and headed for the decorating department on the third floor. Managers Kruse and Valentino followed them. The managers made insulting comments, like referring to old ladies who had nothing to do but walk around the store. The managers said they could follow them all day, because they were paid to do this. Kowal did not make any comment about Valentino's bald head.

Managers Kruse and Valentino testified concerning the events of November 24, although not in the same detail as the General Counsel's witnesses. Kruse and Valentino testified in sum as follows: They followed Kluska through the store, pursuant to company policy to stick with union organizers to make sure they did not harass employees. There was bantering going back and forth, and ''a lot of laughing and kidding.'' Most of the comments were between Valentino and Kowal. Valentino asked Kowal why she called Laura Daly at home and harassed her (Daly was the union activist who was promoted to a management position). Kowal remarked that Valentino was funny because his hair must have grown on the inside of his head and tickled his brain. Valentino retorted with a remark that ''nice retired old ladies like you have nothing better to do than to come in here and bother our consultants.'' Valentino further testified in sum as follows: He saw Joel Nelson enter the store, and subsequently saw Manager Heffernan talking to him. Heffernan asked him how he was doing. (Heffernan subsequently left the Company's employ and presently lives in Florida.) Valentino carries a cordless phone because he has no office, but its range does not carry beyond the store. He was in the Coney Island restaurant that day, possibly with other managers, and possibly at the same time as the union group. However, he usually goes to the Coney Island for his break or lunch. (Valentino and Manager Greene testified in sum that although there are four restaurants outside the store in the Mall, most company personnel, including employees and managers, prefer the Coney Island.) None of the Company's witnesses, in their testimony, denied intentionally following the union group to the Coney Island.

I find that the testimony of the General Counsel and company witnesses together reflects the substance of what transpired on November 24. Corporate official, Bechard, was correct in what he told organizer Kowal. It is evident that as on October 5, the Union engaged in a show of strength and effort to enlist the support of employees at work, by parading through the store during store hours. The General Counsel witnesses' testimony concerning the remarkable set of coincidences which allegedly brought union organizers and supporters together in the store, strains credulity. As indicated Nelson testified that he met Kowal, Schultz, and Stanton at the main store entrance. Nelson thereby contradicted Schultz' assertion that she and Stanton happened to meet Kowal in the store. I find incredible Kowal's assertion that she, Giles, and Del Greco took Schultz on a tour of the furniture department. Schultz testified that she visited the Westland Mall store six to eight times during the preceding year, and sometimes shopped there. It is evident that she did not need an escort to show her around. Kowal, in her testimony, never indicated that she actually attended the alleged luncheon of retirees.

I find, for the reasons discussed in connection with the events of October 5, that the Company was lawfully entitled to and did in fact engage in surveillance of nonemployee union organizers who engaged in a union demonstration in the store. As on October 5, the managers addressed their remarks to the nonstore employees (principally Kowal). Therefore the present allegation is without merit, insofar as the complaint alleges that the Company engaged in coercive surveillance of employee union adherents in the store.

The managers' actions outside the store present a closer question. As indicated, the managers, in their testimony, did not deny that they followed the union group to the Coney Island restaurant. The inference is warranted, and I so find, that the managers continued to follow the union group pursuant to their instructions to stick with the union organizers. When the union group left the store, the organizers were no longer engaged in open union activity. However, I am not persuaded that the managers thereby either engaged in or created the impression of coercive surveillance. The managers did not seat themselves close to the union group, and it was obvious to the union group that the managers could not overhear their conversation. The testimony of company witnesses indicates that it was not unusual for managers and employees to be present at the same time in the Coney Island. In these circumstances, the managers did not by their ''actions and words'' indicate their ''intention to observe at close range'' the employees' ''union activity i.e., to actually monitor'' their ''union activity.'' Compare *CVN Companies*, 301 NLRB 789 fn. 2 (1991), enfd. 957 F.2d 911 (D.C. Cir. 1992).

7. Alleged threats to Mary Grab

The complaint alleges that about October 1 and 10, the Company, by Manager Kruse, threatened employees with written warnings because of their support for or activities on behalf of the Union.

As indicated, Mary Grab worked in the carpeting department. Grab's husband Paul worked at Ford Motor Company, where he was a member of the Union. Paul Grab often came back to the store to pick up Mary after work. During the period in question he often wore a union jacket. The furniture department is near carpeting. The union campaign at Westland Mall began among the furniture department employees, but those employees eventually changed sides and became openly antiunion.

Mary Grab testified in sum as follows: In early October Manager Kruse, who was then her supervisor, summoned her to his office. Kruse told Grab it was reported to him that her

husband was giving looks to people in the furniture department, and making noises at them. Kruse said it had to stop, that Mary Grab was responsible for her husband's actions during working hours, and if it continued, she would be written up. Grab told Kruse that she was not responsible for her husband's actions, and Kruse should discuss the matter with him. Several days later, Paul Grab was waiting in the store for his wife to finish work. Mary Grab introduced her husband to Kruse, ''The handshake got tighter and tighter.'' (Paul Grab is bigger, although older than Kruse.) Paul asked Kruse if his smile was good enough. He told Kruse that if he did not like something that Paul did, he should discuss it with Paul, and not bring Mary into it. Kruse walked away and Paul Grab left. But 2 minutes later Kruse came back yelling, ''He did it again!'' Kruse told Mary Grab he would see her Monday morning. She responded that Kruse could talk to her lawyer.

Manager Kruse, the only other witness to testify concerning this matter, testified in sum as follows: Shortly after he was given managerial responsibilities, which included carpeting, a group of employees from the furniture department complained to him that they felt Paul Grab was harassing them. They said he snorted, grunted, coughed and would come up behind them and make rude noises. Kruse initially did nothing, but a few days later he received similar complaints, e.g., that Paul Grab was making spitting sounds, and glaring and whistling at employees. Kruse also received a report that Paul Grab was in the office complex area, which is off the selling floor. Kruse summoned Mary Grab to his office, and expressed his concern about Paul's alleged behavior. Kruse told Mary that she was responsible for her husband's conduct when he was in the building. Mary said, ''Fine,'' and that she was not aware of any problem. Kruse also told Mary she could not bring her husband into the office complex without a manager's approval (Mary Grab testified that Kruse raised this matter prior to the incidents in question). Kruse did not at any time threaten to give Mary Grab a verbal or written warning.

Kruse further testified in sum as follows: About a week later, as the store was closing, Paul Grab came and introduced himself. They shook hands. Grab asked Kruse whether his smile was good enough, and proceeded to squeeze Kruse's hand increasingly tightly. He told Kruse that it was not right for Kruse to talk to Mary about him, and warned him not to do it. Kruse pulled away and left for his office. Shortly thereafter, as Kruse returned to the selling floor, an employee told him, ''He just did it again.'' (Paul Grab had just left.) Kruse told Mary Grab, who answered that she could not help that, and Kruse should deal with Paul. Kruse said they would talk about the matter. Mary Grab refused, saying that Kruse would talk to her attorney.

I find it unnecessary to resolve whether Kruse threatened to give Mary Grab a written warning. Assuming that he did so, his conduct would not, in the circumstances, constitute an unfair labor practice. Paul Grab was present in the store as a guest of employee, Mary Grab for the purpose of taking her home from work. Therefore Kruse could reasonably assert, as he did, that Mary Grab was responsible for her husband's behavior while he was in the store. At least, Kruse's decision to take this position did not rise to the level of an unfair labor practice. The evidence fails to indicate that Kruse would have acted differently if Mary Grab was not a leading union adherent. The General Counsel failed to present evidence that company policy or practices differed in any comparable situations. Therefore, I am recommending that this allegation of the complaint be dismissed.

8. Alleged threats of loss of benefits or other adverse consequences in the event of unionization

The complaint alleges that the Company, by Personnel Manager Greene: (1) about late summer, threatened employees with loss of benefits if the Company was required to negotiate with the Union, (2) about late August, threatened employees with loss of benefits and that everything would have to be renegotiated if the Company was required to bargain with the Union; and (3) about February 8, threatened employees with more onerous working conditions and that she would be less flexible if the Company and the Union reached agreement on a contract.

The Company has, in addition to a pension plan, a supplemental retirement and savings plan (SRSP). The Company's store employees (who as indicated are not covered by any collective-bargaining contract) are covered by the pension plan and are eligible to participate in SRSP.

Gloria Cooke works in the fashion jewelry department at the Westland Mall store. Cooke testified in sum as follows: In late summer Personnel Manager Greene came by her department and asked how she liked working at the Company. Greene said something about a contract. Cooke responded that ''we have nothing to lose when we go bargain.'' Greene replied: ''Yes, we can either have SRSP or a pension but we cannot have both.''

Cooke further testified that in February she asked Greene for an advance on her vacation pay. Greene agreed. On her direct examination Cooke testified that Greene said that ''once the Union comes in she won't be able to do favors or be as liberal about things as she is now.'' On cross-examination Cooke testified that Greene said she would not be as flexible, or that she won't be able to be as flexible as she is now. Cooke did not recall whether Greene explained what she meant.

Earl Cook, who also works at the Westland Mall store, has worked for the company for 43 years. In July or August he attended a company seminar on retirement benefits, conducted by Greene and Bernie Schlepper, the Company's corporate director of SRSP benefits. Some 25 to 30 employees were present. Cook testified in sum as follows: Greene and Schlepper, using a projector, visually compared the Company's employee benefits with those of its competitors. Greene, next using a flip chart, mentioned that company warehouse employees represented by the Teamsters union did not have SRSP in their contract. Cook regarded SRSP, under which the Company makes matching contributions, as critical to his retirement plans. Greene, referring to the flip chart, listed benefits which the employees enjoyed (Cook did not recall whether the list included SRSP). Cook initially testified that Greene said ''we would probably lose them and they would have to be renegotiated in the union contract if the UAW came in.'' Cook subsequently testified that she said ''they would all be gone and would have to be renegotiated with the Union.''

Personnel Manager Greene testified in sum as follows: She and Schlepper conducted a series of retirement benefit meetings for employees during the summer of 1992. Gloria Cook

attended one of the meetings. Greene asked Cooke what she thought of the meeting, and what she felt she would be able to gain from a union contract. Cooke answered, ''[W]e have nothing to lose,'' explaining that ''we keep SRSP and we get a better pension.'' Greene responded that both were negotiable. She did not say that they could not have both.

With regard to the second alleged conversation with Gloria Cooke, Greene testified in sum as follows: In early February Cooke requested a vacation payout. This was the third time she did this. Greene agreed to give her 2 weeks' vacation pay. Greene told Cooke that she might not be as flexible if there were a union contract.

With regard to the retirement benefits meetings, Greene testified that she used the flip chart as a script. The text was introduced in evidence. The 14th (final) page of the flip chart is the only one containing reference to unions or unionization (entitled ''comparison to union plans''). That page states in pertinent part that pension benefits and SRSP are negotiable issues, that all department store division employees are on the company retirement plan, except for one unit who is on a Teamsters plan, and that Detroit Teamsters Local 299 is not on SRSP ''despite numerous bargaining demands for the plan.'' Greene testified that she did not say that employees would lose, or probably would lose any benefits, but said only that all benefits were negotiable. She further testified that Earl Cook was present at one of the meetings, and asked some questions.

As indicated, both Gloria Cooke and Earl Cook tended to shift or equivocate in describing what Greene allegedly said. I have no comparable reservations with respect to Greene's testimony concerning these matters. I credit Greene, and do not credit the testimony of the employees insofar as it conflicts with Greene's testimony.

I find that Greene, by her statements did not violate the Act as alleged in the complaint.[4] Greene could lawfully state, as she did, that both pension and SRSP were negotiable. She also did not violate the Act by truthfully telling the employees that the Teamsters unit employees did not have SRSP, despite numerous bargaining demands for the plan. Greene did not thereby either expressly or impliedly threaten the employees that the Company would unilaterally withdraw SRSP, or fail to bargain in good faith with the Union concerning SRSP. An employer may ''stress to employees those benefits they have received without a union's assistance, and contrast wages and working conditions in his plant with those in unionized plants.'' *John W. Galbreath & Co*., 266 NLRB 96 (1983); see also *Clark Equipment Co*., 278 NLRB 498, 499–500 (1986); *Sheraton Plaza La Reina Hotel*, 269 NLRB 716, 717–718 (1984).[5] Greene also did not act unlawfully by telling Gloria Cooke that she might not be as flexible under a union contract. Greene simply lawfully informed Cooke of the possibility that under a negotiated union contract, management might have less or no discretion to grant early payout of vacation pay, i.e., that contract terms might be adverse to her interests. See *Walter Garson Jr. & Associates*, 276 NLRB 1226, 1230 (1985); *Montgomery Ward & Co*., 288 NLRB 126 fn. 3 (1988). Therefore, I am recommending that these allegations of the complaint be dismissed.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminatorily issuing a written warning to Nancy Kluska because of her union and concerted activities, the Company has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) of the Act.

4. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act, the Company has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Company has committed violations of Section 8(a)(1) and (3) of the Act, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. I shall recommend that the Company be ordered to rescind the written warning issued to Nancy Kluska in October 1992, to remove from its records any reference to the warning, to give Kluska written notice of such expunction, and to inform her that this unlawful conduct will not be used as a basis for future personnel actions against her.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Department Store, Division of Dayton Hudson Corporation, Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[4] Greene apparently engaged in unlawful interrogation when (as she admitted) she asked Gloria Cooke what Cooke felt she would be able to gain from a union contract. Greene raised the subject, she had no legitimate reason to question Cooke, and she gave Cooke no assurance against reprisal, although the Company engaged in discriminatory actions against union adherents. However, the General Counsel has made no allegation in this regard, and the Company was not on notice that this aspect was in litigation. Therefore, I am making no findings concerning interrogation.

[5] The Union's reliance (Br. 20) on *International Harvester Co*., 258 NLRB 1162 fn. 3 (1981), is misplaced. In that case, the Board found that the employer, on several occasions, ''stated outright'' that the employees would lose the benefit in question if they voted for union representation. The Board held that the employer did not remedy these threats by ''belatedly'' telling the employees that the benefit would be subject to negotiations, but reminding them that no union-represented unit had been able to negotiate a retention of the benefit in their contracts. In the present case, the credited testimony indicates that the Company never told employees they would lose SRSP under a union contract.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

(a) Discouraging membership in the Union or any other labor organization, by issuing warnings to employees or otherwise discriminating against them because of their union activities.

(b) Discriminatorily prohibiting employees from distributing union literature or prohibiting them from distributing union literature during nonwork time and in nonwork areas.

(c) Discriminatorily prohibiting employees from wearing union buttons or other insignia.

(d) Discriminatorily imposing restrictions upon the movements and talking of employees because of their union activities.

(e) Engaging in surveillance of employees because of their union activities.

(f) Discriminatorily excluding guests of employees from its employee lunchrooms because of the union activities of the employees or their guests.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the written warning issued to Nancy Kluska in October 1992, remove from its records any reference to the warning, and notify her in writing that this has been done and that evidence of the warning will not be used as a basis for future personnel actions against her.

(b) Post at its Westland Mall and Eastland Mall stores, copies of the attached notice marked ''Appendix.[7] Copies of the notice on forms provided by the Regional Director for Region 7, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt, and maintained for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''